UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK
POUGHKEEPSIE DIVISION

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In re:

FRANK P. FUCILO, Case No. 00-36261(CGM)

Debtor. Chapter 7

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MEMORANDUM DECISION GRANTING RELIEF FROM THE PERMANENT INJUNCTION OF 11 U.S.C. § 524

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UNITED STATES BANKRUPTCY JUDGE

The State of New York ("State") has motioned this Court for an order determining that the permanent injunction of 11 U.S.C. § 524 should not enjoin the State from going forward with an action in Supreme Court of the State of New York captioned State of New York v. Frank Fucilo, et. al, Index Number 00/402214 ("State Action").[1] The defendant in the State Action is Frank P. Fucilo, the Debtor in the above-captioned bankruptcy case.

The State originally motioned this Court for an order determining that, pursuant to 11 U.S.C. § 362(b)(4), the automatic stay of 11 U.S.C. § 362(a) does not apply to the State Action. In the alternative, the State sought an order lifting the stay in order to proceed with the State Action. However, Debtor received a discharge prior to the proper service and filing of the State's motion. After a preliminary hearing on the State's re-served motion, the State amended its motion as one for relief from the permanent injunction of 11 U.S.C. § 524.

After hearing on the State's application for relief from the permanent injunction of 11 U.S.C. § 524, and upon consideration of the record, for the reasons set forth below, this Court finds that the State Action may proceed. This memorandum clarifies the decision granting the

[1] State of New York v. Frank Fucilo; Tiber Tomshaw; Saferate Financial Services, Inc.; Redbank Petroleum, Inc.; Caffe Diva; World Vision Entertainment, Inc.; Technical Support Services, Inc.; Pacific Air Transport, Inc., Corlogic Corporation, New York Supreme Court, New York County, Index Number 00/402214.

State's motion rendered from the bench on January 15, 2002.[2]

I. Issue

The issue for this Court is the effect, if any, of the Bankruptcy discharge on the State's ability to pursue an enforcement action in state court against Fucilo based on his pre-petition conduct.

Fucilo asserts that the State is enjoined from pursuing the State Action under 11 U.S.C. § 524(a)(2) because any liability he may have had on the State's claims was released as part of his discharge pursuant to 11 U.S.C. § 727. The State contends that Fucilo's bankruptcy has no effect on its claims and ultimately maintains that its claims would not have been subject to discharge in any event. (See Attorney General's Supplemental Memorandum of Law In Support of State's Motion at pp. 5-6.)

Fucilo's argument that his liability on the State's claims evaporated with his discharge is unpersuasive, however, because, *inter alia*, any judgment on those claims is subject to an adversary proceeding to determine dischargeability under the Bankruptcy Code. See 11 U.S.C. § 523(a)(7).

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[2] This Court's subject matter jurisdiction is predicated upon 28 U.S.C. §§ 1334(b) and 157(a), and the "Standing Order of Referral of Cases to Bankruptcy Judges" of the United States District Court for the Southern District of New York, dated July 10, 1984 (Ward, Acting C.J.).

In analyzing the parties' arguments, this Court will consider the scope of the Debtor's Discharge Order; whether the permanent discharge injunction of 11 U.S.C. §§ 524, 727 enjoins the State Action, and; whether the police and regulatory exception of 11 U.S.C. § 362(b)(4) is applicable.

II. Decision

The issue presented by the parties has been distilled to three legal questions and independent holdings. First, did the Discharge Order encompass the State's claims? This Court holds that the Discharge Order did not encompass the State's claims and further finds that the ultimate dischargeability of the State's claims is an issue that may be determined within a § 523(a)(7) complaint that may be brought at any time. Second, is the State Action enjoined by the permanent discharge injunction? This Court holds that it is not and finds cause to grant the State relief from the permanent discharge injunction in order to pursue the State Action. Third, does the police and regulatory exception apply to the State Action? This Court holds that it does and finds that the police and regulatory exception applies to the State Action. This decision is limited to the facts of this case. These issues and holdings will be discussed in accordance with the order laid out above.

III. Procedural History

On June 6, 2000, Fucilo filed a voluntary petition for relief under chapter 7 of the United States Bankruptcy Code ("Code"). Fucilo filed for bankruptcy the day before a hearing on an Order to Show Cause was to be brought in state court by the Attorney General of New

York, Eliot Spitzer, which sought a preliminary injunction against Fucilo and eight individual and corporate defendants for alleged conduct in violation of New York General Business Law Article 23-A ("The Martin Act") and New York Executive Law § 63(12). (Affirmation of Block at para. 3-7.) Before Fucilo was served with the Order to Show Cause and the Complaint in the State Action, he filed for bankruptcy protection.

On September 11, 2000, the Attorney General served a motion for an order determining that, pursuant to § 362(b)(4), the automatic stay of § 362(a) does not apply to the State Action. In the alternative, the State sought an order lifting the automatic stay in order to proceed with the State Action. Service of the State's motion was defective and the Attorney General re-served the motion on October 16, 2000. However, on September 13, 2000, an order granting Fucilo a discharge was signed, and docketed on September 16, 2000.

The Court notes that the State's October 16, 2000 motion appears moot since an Order of Discharge was entered in the Debtor's chapter 7 case on September 16, 2000, thereby terminating the automatic stay and imposing a discharge injunction pursuant to § 524. After a preliminary hearing on the State's motion, the State amended its motion as one for relief from the permanent injunction of § 524.[3]

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[3] On February 8, 2001, the Attorney General filed a Supplemental Memorandum of Law In Support of the State's Motion, and at pages 1-2 it states: "[s]ince the state's motion was filed subsequent to the ... discharge, the state seeks to have its motion treated as a motion for relief from the § 524 post-discharge injunction pursuant to this Court's authority under § 105 of the Code."

IV. The State's Action

The State seeks relief from the Debtor's permanent injunction in order to commence its State Action in New York Supreme Court against Fucilo pursuant to New York General Business Law Article 23-A ("The Martin Act") and New York Executive Law § 63(12). The State Action includes requests for injunctive relief and restitution.

i. The New York "Martin Act"

New York General Business Law Article 23-A, the "Martin Act," is remedial in nature with its purpose to defeat any scheme where the public is exploited. People v. Cadplaz Sponsors, Inc., 330 N.Y.S.2D 430, 432 (Sup. Ct. 1972); Gardner v. Lefkowitz, 412 N.Y.S.2d 740 (Sup. Ct. 1978). It provides the regulatory and enforcement framework governing the offer and sale of securities and commodities and other investment vehicles in and from New York. Gabriel Capital, L.P. v. Natwest Fin., Inc., 137 F.Supp.2d 251, 266 (S.D.N.Y. 2000).

Under the Martin Act, the New York Attorney General is responsible both for protecting the investing public as a whole, and for redressing harm suffered by individual investors because of misleading or fraudulent practices in connection with the promotion or sale of securities. State v. 7040 Colonial Road Assocs. Co., 671 N.Y.S.2d 938, 943 (Sup. Ct. 1998) . The purpose is to prevent all kinds of fraud in connection with sale of securities and commodities and to defeat all related schemes whereby the public is exploited. The Act is remedial in nature and should be liberally construed. People v. Lexington Sixty-First Assn., 381 N.Y.S.2d 836, 841 (N.Y. 1976). In addition, it provides a scheme of registration for

individuals and entities who offer issue, or sell securities. Id.

Section 352-c of the Martin Act makes it unlawful for a broker or seller of securities to employ any device, scheme or artifice to defraud, make any untrue statement of a material fact or fail to make reasonable inquiry to ascertain the facts. Neither scienter nor intent to defraud need be proven to establish civil liability or criminal culpability for fraud in sale of securities; rather, the state need only prove that the defendant committed an intentional act constituting fraud. *See* New York General Business Law § 359-c; People v. Sala, 695 N.Y.S.2d 169, 193 (3rd Dept. 1999), *aff'd* 716 N.Y.S.2d 361 (2000).

Section 359-e of the Martin Act provides for the registration of brokers, dealers, salespersons, investment advisors and issuers of securities. Such registration sets forth information concerning the registrant's experience and history in the securities field, including civil or criminal proceedings. Specifically, issuers of securities must file broker-dealer issuer statements. The sale of securities by issuers who are not registered with the Department of Law as brokers or dealers violates § 359-e and constitutes a misdemeanor pursuant to § 359-g(2). Issuers of securities that have not made the required filings pursuant to § 359-e potentially commit fraud in violation of § 352-c.

It is important to note that individual shareholders have no private right of action under the Martin Act. Castellano v. Young & Rubicam, Inc., 257 F.3d 171, 190 (2d Cir. 2001); Gabriel Capital, L.P. v. Natwest Finance, Inc., 137 F.Supp.2d 251, 266 (S.D.N.Y. 2000).

ii. New York Executive Law section 63(12)

New York Executive Law § 63(12) provides the Attorney General with the power to pursue perpetrators of fraudulent conduct. Section 63(12), provides, in pertinent part, that:

> [w]henever any person shall engage in repeated fraudulent or illegal acts or otherwise demonstrate persistent fraud or illegality in the carrying on, conducting or transaction of business, the attorney general may apply, in the name of the people of the state of New York, to the supreme court of the state of New York, on notice of five days, for an order enjoining the continuance of such business activity or of any fraudulent or illegal acts....

New York Executive Law § 63(12).

Section 63 (12) authorizes the Attorney General to bring a special proceeding against a person or business committing repeated or persistent fraudulent or illegal acts. People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 865 (Sup. Ct. 1999). Any conduct which violates a State or Federal law or regulation is actionable under this provision. Id.; *see also*, Matter of State of New York v. Ford Motor Co., 549 N.Y.S.2d 368, 372 (N.Y. 1998). Under § 63 (12), fraud has been interpreted broadly requiring only a showing that the action has a potential to deceive. F.T.C. v. Crescent Publ'g Group, Inc., 129 F. Supp. 2d 311, 319-20 (S.D.N.Y. 2001); People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 848 (1999); *see also*, People v Apple Health & Sports Clubs Ltd., Inc., 613 N.Y.S.2d 868, 869 (1st Dept. 1994). In order for fraudulent or illegal acts to be actionable under § 63 (12), respondents' activities must be repeated either in the sense that there is "repetition of any separate and distinct fraudulent or illegal act," or as "conduct which affects more than one person." F.T.C. v. Crescent Publ'g Group, Inc., 129 F. Supp.2d 311, 320 (S.D.N.Y. 2001);

People v. World Interactive Gaming Corp., 714 N.Y.S.2d 844, 856-57 (Sup. Ct. 1999); *see also*, State of New York v Princess Prestige Co., 397 N.Y.S.2d 360, 362-63 (N.Y. 1977) (finding that § 63 (12) does not require a large number of repeated illegal or fraudulent acts).

iii. The State's Factual Allegations

The State's verified complaint alleges that Fucilo, as a registered securities salesman in New York, participated with other co-defendants in a scheme to defraud unsophisticated investors. (State Action Verified Complaint at para. 2-5, 28 hereinafter "Verified Complaint," and Block Aff. at para. 2-5). Fucilo's alleged role in the scheme was to make investment recommendations to investors, when in fact, those securities were unsuitable. (Verified Complaint at para. 19, and Block Aff. at para. 11.) Fucilo allegedly sold promissory notes to approximately 57 purchasers for a total of approximately $3,417,431.00, earning a total of $303,416.00 in commissions for himself. (Verified Complaint at para. 28.) The State further alleges that each investment recommendation constituted a fraudulent act because Fucilo misled investors into believing that he had sufficient information on which to base his investment recommendations. (Verified Complaint at para. 19, 24-26, and Block Aff. at para. 12.) The State alleges that none of the purchasers of the investments recommended by Fucilo have received either the return of their principal or any interest payments. (Block Aff. at para. 14.) As a result, the State argues that to protect the safety and welfare of the public, it must exercise its police and regulatory powers via the State Action to enforce laws designed to prohibit the practices Fucilo was allegedly engaged in. (Block Aff. at para. 15.)

iv. State's Causes of Action as set forth in the Verified Complaint

The State maintains four (4) causes of action in its verified complaint:

The first cause of action is for Fucilo's alleged violation of the securities registration requirements of the Martin Act § 359-e, which failure is punishable as a misdemeanor under § 359-g(2). Moreover, as an alleged fraudulent practice under § 352(1) it is punishable as a misdemeanor or felony pursuant to § 352-c. (Verified Complaint at paras. 34-36.)

The second cause of action is for material misstatements and omissions made to investors who allegedly purchased certain securities from Fucilo. The alleged acts, consisting of the material misstatements and omissions made by Fucilo, are violations of § 359-c(1) and (2). (Verified Complaint at paras. 37-39.)

The third cause of action is for unsuitable investment recommendations to members of the public without making reasonable inquiry into the investors investment background. The alleged acts, which consist of sales of securities to individuals without regard to the investors' circumstances which constitute fraudulent practices in violation of §§ 352 and 352-c(1) and (2). (Verified Complaint at paras. 40-42.)

The fourth cause of action is for repeated and persistent fraudulent activity for the alleged conduct which took place in connection with the first three (3) causes of action. The alleged fraudulent and illegal acts that the State alleges are within the scope of the Attorney

General's prosecutorial powers under § 63(12). (Verified Complaint at paras. 43-44.)

v. Injunctive Relief Sought in State Action Complaint

The State Action seeks to enjoin Fucilo from engaging in the issuance, offering and/or sale of securities or commodities. (Verified Complaint at para. 1.) The State Action seeks this injunctive relief because the Debtor allegedly engaged in fraudulent practice and may still be engaged in fraudulent practices in violation of §§ 352, 352-c and 359-e, of the Martin Act and § 63(12) of the Executive Law. (Verified Complaint at para. 1.)

vi. Restitution Relief Sought in State Action Complaint

The State Action also seeks restitution and damages pursuant to § 63(12) of the New York Executive Law. (Verified Complaint at para. 1.) The State Action goes on to demand that pursuant to § 353(3) of the Martin Act, and § 63(12) of the Executive Law that defendants make restitution and pay damages for all monies and property obtained and all damages caused directly or indirectly by defendant's alleged fraudulent acts. (Verified Complaint at para. 1, and p. 14 paras. D, E.)

vii. Summary

Pursuant to the Martin Act and New York Executive Law, the State Action seeks to hold Fucilo civilly liable and criminally culpable for alleged fraudulent conduct in connection with the sale of certain securities. The specific liability on the State's claims which Fucilo asserts has been discharged is the injunctive relief and restitution.

V. Applicable Bankruptcy Provisions

Upon the filing of a bankruptcy case, the Code grants the debtor an automatic stay which is ultimately replaced by a permanent discharge injunction. On September 16, 2000, an order granting Fucilo a discharge was docketed. Therefore, in order to grant the State the relief it seeks, this Court must provide relief from the permanent discharge injunction. The operative Code provisions are outlined below:

The automatic stay of § 362(a) operates as a temporary injunction against the:

> commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title...

11 U.S.C. § 362(a)(1).

As a result, the automatic stay of § 362(a) operates as a statutory injunction against the commencement of judicial proceedings against the debtor. Therefore, by filing a voluntary petition, Fucilo "stayed" any acts to "recover a claim against the debtor that arose before the commencement of the case..." 11 U.S.C. § 362(a)(1).

However, an order granting Fucilo his discharge was signed on September 13, 2000 and entered on September 16, 2000. A debtor in a chapter 7 case receives a discharge of debts under the authority of § 727(b) of the Bankruptcy Code, which provides, in relevant part, that "[e]xcept as provided in section 523 of this title, a discharge ... discharges the debtor from

all debts that arose before the date of the order for relief under this chapter..." Upon the issuance of the discharge order, the automatic stay was replaced by a statutorily based permanent injunction against attempts to recover pre-petition debts. A bankruptcy discharge has the following effect, *inter alia*:

> (2) [it] operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor...

11 U.S.C. § 524.

When discharge is granted, the automatic stay of § 362 is dissolved and replaced by permanent injunctive provisions of § 524. *See* 11 U.S.C. §§ 362(a); 362(c)(2)(C); 524. Thus, on September 16, 2000, one month before the State's motion was properly served, the Debtor, pursuant to §§ 524 and 727, was granted a permanent injunction against "an act, to collect, recover or offset any such debt as a personal liability," as well as a discharge of all debts that arose prior to the filing of Debtor's petition on June 6, 2000. The State brought the instant motion after the permanent injunction had replaced the automatic stay. This Court will consider the State's motion. *See generally* In re Burger Boys, 94 F.3d 755, 760 (2d Cir. 1996) (finding case not moot when court can provide practical relief sought by aggrieved party).

VI. Issues for Decision

Issue #1 - The Scope of the Discharge Order

This Court holds that the Discharge Order did not encompass the State's claims and further finds that the ultimate dischargeability of the State's claims is an issue that must be determined pursuant to filing a § 523(a)(7) complaint that may be brought at any time.

i. The Discharge Order Did Not Encompass § 523(a)(7) Claims

The September 16, 2000 Discharge Order, by its own terms, did not encompass the State's claims because the claims appear to be within the scope of § 523(a)(7), and therefore not likely covered by the Discharge Order.

Fucilo's argument that his liability on the State Action dissolved upon his discharge is unpersuasive because any judgment on those claims would probably not have been subject to discharge under § 523(a)(7). S.E.C. v. Fenster, 929 F.Supp. 1346, 1348 (D. Colo. 1996); *see also* In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991). Section 523(a)(7) reads: "[a] discharge under section 727 ... of this title does not discharge an individual debtor from any debt ... to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss..." A judgment in favor of the State on its claims would probably fall within the scope of § 523(a)(7). Fenster, 929 F.Supp. at 1348; *see also* In re Murray, 128 B.R. at 519-20.

According to Fucilo's Discharge Order, the Bankruptcy discharge released him "from all dischargeable debts" and declared "any judgment heretofore or hereafter obtained ... null and void" to the extent they purport to hold him personally liable for "debts alleged to be excepted from discharge under clauses (2), (4), (6) and (15) of 11 U.S.C. § 523(a)." *See* Discharge Order dated September 13, 2000; *see also*, Fenster, 929 F.Supp. at 1348 n.3.

A complaint under sections 523(a)(2), (4), (6) and (15) must be filed within 60 days following the creditors' meeting; if not, then debts of those kind are discharged. In re Taibbi, 213 B.R. 261, 273 (Bankr. E.D.N.Y. 1994). Therefore, if a creditor has any ground to except his debt from discharge under one of those subsections, he must file a timely complaint or forever lose his rights. Taibbi, 213 B.R. at 272-73.

Missing from the list of future judgments declared "null and void" are those that would purport to hold Fucilo liable for debts alleged to be excepted from discharge under section 523(a)(7). Fenster, 929 F.Supp. at 1348 n.3. Section 523(c)(1) and Federal Rule of Bankruptcy Procedure 4007(c) make clear that a creditor holding grounds to except his debt from discharge under any of the other subsections of § 523(a) need not file a complaint within 60 days, and his failure to do so will not result in the automatic discharge of the debt. Taibbi, 213 B.R. at 273. Rather, the Rule provides that a complaint may be filed at any time, and the case may even be reopened for that purpose. *See* In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991); *also* In re Riley, 202 B.R. 169, 177 (Bankr. M.D. Fla. 1996) (explaining that there is no time limit for filing a complaint pursuant to § 523(a)(7)); *see also*

In re Maxwell, 229 B.R. 400 (Bankr. W.D. Ky. 1998).

ii. The State's Section 523(a)(7) Claims Need Not Have Been Brought Prior to Discharge

Bankruptcy courts possess exclusive jurisdiction to determine the dischargeability of debts under paragraphs (2),(4),(6) and (15) of § 523(a), but concurrent jurisdiction with respect to debts within the other paragraphs of § 523(a). In re Szczepanik, 146 B.R. 905, 913 (Bankr. E.D.N.Y. 1992). The dischargeability of debts under paragraphs other than (2), (4), (6) and (15) of § 523 may be determined at any time, in any forum. Adam Glass Svce., Inc. v. Federated Dept. Stores, Inc., 173 B.R. 840, 843 (Bankr. E.D.N.Y. 1994).

A creditor need not file an adversary proceeding to determine the dischargeability of a debt under § 523(a)(7) within the 60 day period and, in fact, need not file one at all. Taibbi, 213 B.R. at 272-73. Rather, the creditor is free to pursue its claim in another forum, such as a state court, which has concurrent jurisdiction. Id. A debtor, faced with the pursuit of such a claim, may raise the discharge as an affirmative defense and the state court may make its determination. Alternatively, the debtor may return to the bankruptcy court, re-opening his case if necessary, to obtain a determination here. In re Szczepanik, 146 B.R. at 910.

A party who fails to file an adversary proceeding regarding dischargeability of a specific debt, while not precluded from pursuing the debt elsewhere, is not entitled to an advance judicial determination by a bankruptcy court that the debt is nondischargeable. Taibbi, 213 B.R. at 273. This is because § 523(a)(7) only excepts from discharge those debts which are

payable to and for the benefit of a governmental unit, which are not compensation for actual pecuniary loss. Id. Where the dischargeability of a specific debt is disputed it must be judicially determined, and all parties must be afforded due process. The due process required is set forth in Fed. R. Bankr P. 7001. Id.

However, the State need not file an adversary proceeding to determine dischargeability under § 523(a)(7) before being allowed to pursue the State Action. This Court declines to find that the bankruptcy discharge strips a state of its right to pursue state court "public purpose litigation" simply because it could have commenced an action or brought a motion prior to the entry of the permanent discharge injunction but did not. *See* Fenster, 929 F.Supp. 1349; *see generally*, In re Stelweck, 86 B.R. 833 (Bankr. E.D. Pa. 1988). Moreover, the State should not have to file a complaint objecting to a debtor's discharge when any liability the debtor may ultimately have on the State's claims would be nondischargeable under section 523(a)(7). Fenster, 929 F.Supp. 1349, *see also*, In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991).

iii. Summary

Fucilo's Discharge Order did not encompass the State's claims because a discharge in bankruptcy discharges debts that are not excepted under § 523. Without determining herein the dischargeability of the State's claims, an examination of the State's claims (see *infra*) shows that they are of a type that may fall within the scope of § 523(a)(7). The ultimate determination of whether the State's claims have been discharged is an issue for

determination pursuant to filing a § 523(a)(7) complaint. Such a proceeding may be brought at any time, in a court of competent jurisdiction. The State should be allowed to pursue the State Action and reduce its claims to a judgment. Should the State be awarded a judgment, the issue of dischargeability will be considered.

Issue #2 - The State Action Is Not Enjoined by the Permanent Discharge Injunction

This Court holds that cause exists to grant the State relief from the permanent discharge injunction in order to pursue the State Action; therefore, the permanent discharge injunction is modified to permit the State Action to go forward.

Fucilo asserts that the State is enjoined from pursuing the instant action because he was released from any liability he may have had under the state's claims as part of his discharge pursuant to §§ 524, and 727. This Court disagrees with Fucilo, and holds that the permanent injunction of § 524 may be modified to permit the State Action to proceed. In so concluding, this Court examines whether the discharge of Debtor's pre-petition debts could have included the Debtor's potential liability on the State's claims for injunctive relief and restitution.

A. Modification of the Permanent Injunction

As stated in the preceding section, absent a complaint seeking a determination of the dischargeability the State's claims, this Court will not decide the issue of whether the State's claims were actually discharged. However, because the State's claims are of a type that are subject to a § 523(a)(7) complaint, it is consistent with the overall purpose of the Code to

consider the State's request for relief from the permanent injunction. As a result, pursuant to the State's request, this Court will treat the motion as one for relief from the permanent discharge injunction. 11 U.S.C. § 105; *See*, In re Annabel, 263 B.R. 19, 26 (Bankr. N.D.N.Y. 2001); *also* In re Winterland, 142 B.R. 289 (C.D. Ill. 1992); In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991).[4]

i. The Permanent Injunction Can be Modified

The injunctive provisions of § 524 must be considered in conjunction with the overall purposes of the Code and modification will be permitted under the appropriate circumstances.[5] Although the Bankruptcy Code does not expressly authorize the modification of a discharge (as distinct from its revocation, § 727(d)) such a request is equivalent to the dissolution of the § 524 injunction created by the discharge. *See* In re

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[4]A brief review of the procedural history of this case, underscores the State's uncommon request. The State brought its October 16, 2000 motion (originally served on September 10, 2000, but defective) on two grounds: first, the State requested that the automatic stay be declared inapplicable in light of the exception to the automatic stay found under 11 U.S.C. § 362(b)(4), and; in the alternative, citing In re Sonnax, that the automatic stay be modified for "cause" pursuant to 11 U.S.C. § 362(d)(1). Debtor opposed the relief requested by the State. Debtor alleged the injunctive provisions of 11 U.S.C. § 524 were in effect. After preliminary hearing, the parties were asked to brief the issue of the effect of 11 U.S.C. § 524. The Attorney General submitted a Supplemental Memorandum of Law In Support of State's Motion and at pp. 1-2 stated: "[s]ince the state's motion was filed subsequent to the ... discharge, the state seeks to have its motion treated as a motion for relief from the § 524 post-discharge injunction pursuant to this Court's authority under § 105 of the Code." The Debtor did not oppose.

[5]*See generally,* Green v. Welsh, 956 F.2d 30 (2d Cir. 1992); Terwilliger v. Terwilliger, 206 F.3d 240 (2d Cir. 2000); Capital Communs. Fed. Credit Union v. Boodrow, 126 F.3d 43 (2d Cir. 1997); In re Farley, 194 B.R. 553 (Bankr. S.D.N.Y. 1996); Tycon Tower I Inv. L.P. v. John Burgee Architects, No. 95 Civ. 6951 (DAB), 95 Civ. 6952, 1999 U.S. Dist. LEXIS 13305 (S.D.N.Y. August 31, 1999); In re Ames Dept. Stores Inc., No. 93 Civ. 4014 (KMW), 1995 U.S. Dist. LEXIS 6704 (S.D.N.Y. May 18, 1995); In re White Motor Credit Corp., 761 F.2d 270, 274 (6th Cir. 1985); Shade v. Fasse, 40 B.R. 198, 200 (Bankr. D. Colo. 1984); In re McGraw, 18 Bankr.140, 143 (Bankr. W.D. Wisc. 1982).

Hendrix, 986 F.2d 195, 198 (7th Cir. 1993). Determining whether relief from the permanent injunction is warranted under appropriate circumstances should be analyzed pursuant to a cause standard. In re McGraw, 18 Bankr.140, 143 (Bankr. W.D. Wisc. 1982).

ii. Application of the Sonnax Factors *to the Permanent Injunction*

Such a cause standard is found in In re Sonnax Industries, Inc., 907 F.2d 1280 (2d Cir. 1990). In Sonnax, the Second Circuit provided a framework for determining whether cause exists, thereby requiring a court to examine certain factors, including (1) whether relief would result in partial or complete resolution of the issues, (2) the lack of any connection to or interference with the bankruptcy case, (3) whether a specialized tribunal with the necessary expertise has been established to hear the cause of action, (4) whether the litigation would prejudice the interests of other creditors (5) the interests of judicial economy and expeditious and economical resolution of the litigation, (6) whether the parties are ready for trial in the other proceeding, and (7) the impact of the stay on the parties and balance of harms. Id. at 1285.

Cause exists to accord the State relief from the permanent injunction for several reasons. First, the state courts have the necessary specialization to hear the State Action. Second, modifying the permanent injunction would not harm the Debtor or his creditors. It would not alter the right of any creditor to participate in a distribution from the Debtor's bankruptcy case. Third, it is in the interest of judicial economy to grant relief from the permanent injunction since the State Action involves multiple parties, including numerous non-debtor

parties. Fourth, not providing relief from the permanent injunction harms the State as it prohibits the State from carrying out its responsibility to protect the public from the Debtor's alleged wrongful securities sales and business practices. This Court will not permit the Debtor to use the Code for such an improper purpose.

As further cause, this Court identifies three additional points: the discharge order did not encompass the State Action; the State's claims might not have been discharged and; the police and regulatory exception applies to the State Action.

B. Fucilo's Discharge and Liability on the State Action

The September 16, 2000 Order of Discharge effectively discharged all of the Debtor's qualifying pre-petition debts. The Debtor has asserted that the State's claims for restitution and injunctive relief were pre-petition claims, and that those claims were discharged when the Discharge Order was entered. Whether the discharge injunction of § 524(a)(2) applies to enjoin the State Action depends on whether the State's claims for restitution and injunctive relief were qualifying pre-petition debts. Without reaching the issue of dischargeability, this Court finds that the State Action should proceed because the State's claims are of a type which could be subject to § 523(a)(7) complaint.

i. Claim for Restitution

The State's claim for restitution arising from the Debtor's alleged unlawful conduct is of a type that may not have been discharged pursuant to the September 16, 2000 Order of

Discharge.

As stated in § 727(b), qualifying pre-petition debts are discharged, "[e]xcept as provided in section 523." Because discharge in bankruptcy is not intended to be a haven for wrongdoers, a chapter 7 debtor may not discharge: "any debt ... to the extent such debt is for a fine, penalty or forfeiture payable to and for the benefit of a governmental unit, and is not compensation for actual pecuniary loss..." 11 U.S.C. § 523(a)(7), *see also*, United States HUD v. Cost Control Mktg. & Sales Mgmt., 64 F.3d 920 (4th Cir. 1995).

The Supreme Court has given § 523(a)(7) a broad reading, and has held that it applies to all criminal and civil penalties, even those designed to provide restitution to injured private citizens. Kelly v. Robinson, 479 U.S. 36 (1986) (criminal restitution obligation was not dischargeable); Pennsylvania Dep't of Public Welfare v. Davenport, 495 U.S. 552, 562 (1990) (stating that § 523(a)(7) applies to both criminal and civil fines); United States HUD v. Cost Control Mktg. & Sales Mgmt., 64 F.3d 920 (4th Cir. 1995) (holding that civil restitution is nondischargeable); *see generally*, In re Taite, 76 B.R. 764 (Bankr. C.D. Cal. 1987); In re Kelly, 155 B.R. 75 (Bankr. S.D.N.Y. 1993); In re Sokol, 170 B.R. 556 (Bankr. S.D.N.Y. 1994), *aff'd*, 181 B.R. 27 (S.D.N.Y. 1995). This Court acknowledges that some courts have developed a restrictive view of the dischargeability of a restitution award. *See, e.g.*, In re Towers, 162 F.3d 952, 956 (7th Cir. 1998) (concluding that a restitution order entered after a civil proceeding under Illinois' Consumer Fraud Act was dischargeable because it was not literally payable to and for the benefit of the government); In re Rashid,

210 F.3d 201, 208 (3d Cir. 2000) (adopting the Towers court's reasoning). This Court is not rendering a decision on the dischargeability of the State's claims at this time; rather, this Court recognizes that the State's claims are of a type which could be subject to § 523(a)(7) complaint (see supra). *See* In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991).

In finding that § 523(a)(7) applies to restitution obligations, the Supreme Court has stated that in order to be excepted from discharge, debts must satisfy two requirements: (1) they must be to and for the benefit of a governmental unit; and (2) they must be penal, rather than pecuniary, in nature. Kelly, 479 U.S. at 51-52. A review of the State's verified complaint, suggests that the State's claims may satisfy both parts of the test.

The first prong is satisfied because restitution ensures compliance with the Martin Act and safeguards the public interest in such compliance. SEC v. Petrofunds, Inc., 420 F. Supp. 958, 960 (S.D.N.Y. 1976) (holding that "to permit the retention of . . . illicit profits . . . would impair the full impact of the deterrent force that is essential if adequate enforcement of [the Act] is to be achieved"). Likewise, the second prong is satisfied because the restitution sought in this case is not merely civil but penal in nature as well, and is not driven by the victims' desire for compensation. Any money judgment which arises out of the claims will be paid to the State, and the judgment will punish the defendants for violations of the Martin Act and deter future violations by the defendants and others. Though the State's claims appear to be for civil restitution, the verified complaint reveals that the restitution component is part of a scheme of punishment for possible criminal conduct by Fucilo. *See generally*

U.S. v. Grundhoefer, 916 F.2d 788 (2d Cir. 1990) (explaining that court-ordered restitution should go to government but be applied to loan obligations owed by victims to the government). Furthermore, § 63(12) of the Executive Law of the State of New York was enacted in recognition of the realities of consumer fraud. No private right exists under that law. *See generally* In re DeFelice, 77 B.R. 376 (Bankr. D. Conn. 1987). Only the Attorney General is authorized, under § 63(12), to pursue a remedy, including restitution. The fact that a private citizen cannot seek a remedy pursuant to § 63(12) weighs in favor of the the State's argument.

By permitting the State Action to go forward in state court, this Court does not reach the issue of dischargeability of any judgment which might eventually arise from the State Action. *See* In re Murray, 128 B.R. 517, 519-20 (Bankr. N.D. Tex. 1991). Rather, this Court's finding is limited to a recognition that the State's claims are of a type that could be nondischargeable. Id. In light of this, this Court finds that the State may proceed with its State Action. Id. The issue of § 523(a)(7) dischargeability of the possible judgment will be an issue for later determination. *See generally* In re Annabel, 263 B.R. 19 (Bankr. N.D.N.Y. 2001); In re Murray, 128 B.R. at 519-20.

ii. Claim for Injunctive Relief

In the instant case, the State seeks relief from the discharge injunction in order to pursue injunctive relief and other relief for possible fraud by Fucilo. The State is entitled to relief from the discharge injunction in order to pursue injunctive relief in state court, because the

state court should determine whether the purported conduct by Fucilo was in violation of New York State law. *See* Annabel, 263 B.R. at 27; In re Murray, 128 B.R. at 519-20.

Debtor has asserted that the right of the State to seek injunctive relief was a pre-petition claim, and that this claim was discharged when the Discharge Order was entered. The relevant statutory provisions are:

> Section 101(5) "claim" means:
>
> right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured....

11 U.S.C. § 101(5)(A).

> Section 101(12) "debt" means liability on a claim.

11 U.S.C. § 101(12).

In Ohio v. Kovacs, 469 U.S. 274 (S. Ct. 1985), the State of Ohio obtained a pre-petition injunction against Kovacs in state court which, among other things, ordered Kovacs to clean up a hazardous waste disposal site he operated. When Kovacs' failed to perform his clean up obligation under the injunction, the State obtained the appointment of a receiver to clean up the site. *See* id. at 276. Before the receiver had completed Kovacs' obligations under the state court injunction, Kovacs filed a bankruptcy petition. The Court held that injunctive relief will be dischargeable where the injunction has been converted or reduced to an obligation to pay money. *See* id. at 283. The State Action claim for injunctive relief herein is not of a

type that is necessarily dischargeable because unlike Kovacs, the State seeks an injunction for which a monetary expenditure is unlikely.

The Court notes that at oral argument, and in Debtor's opposition papers (*see, e.g.* Fucilo's Second Affidavit at para. 8), Debtor made representations to this Court that it does not necessarily oppose the injunctive relief that the State seeks in its State Action. As with the claim for restitution, the issue of § 523(a)(7) dischargeability of the injunctive relief is an issue for later determination.

Issue #3 - The Police and Regulatory Exception Applies

This Court holds that the police and regulatory exception applies to the State Action, and as a result, the State Action is excepted from the permanent injunction.

The Court considers, as an alternative theory granting relief to the State, whether the police and regulatory exception is applicable to the permanent injunction. Even though this Court has found that the permanent injunction may be modified in order to allow the State Action to proceed this Court further finds that the police and regulatory exception applies and the State Action may proceed consistent with § 362(b)(4). Further, this Court responds to Debtor's arguments concerning restitution damages in the context of § 362(b)(4) and holds that an action for restitution damages does not in and of itself violate the scope of § 362(b)(4).

i. Applicability of the Police and Regulatory Exception

Because §§ 362(a) and 524(a)(2) must be read together, this Court finds that § 362(b)(4) does not cease to apply upon a debtor's discharge. Rather, this Court finds that if state court proceedings in pursuit of a governmental entity's regulatory powers are excepted from the automatic stay, commencement or continuation of the same proceedings after a debtor's discharge should not violate the post-discharge injunction under § 524(a). *See generally* In re Pincombe, 256 B.R. 774, 782 (Bankr. N.D. Ill. 2000).[6]

ii. Sections 362 and 524 Must be Read Together

Under § 362(b)(4), certain actions by governmental units are explicitly exempted from the automatic stay. The purpose of this exemption is "to prevent a debtor from 'frustrating necessary governmental functions by seeking refuge in bankruptcy court.'" *See* City of New York v. Exxon Corp., 932 F.2d 1020, 1024 (2d Cir. 1991). The legislative intent of this section is to exempt a governmental unit from the automatic stay where that agency is "suing a debtor to prevent or stop violation of fraud, environmental protection, consumer protection,

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[6] This Court notes that because the § 362(b)(4) exception takes effect immediately, a governmental agency exercising its police or regulatory power under § 362(b)(4) is not required to motion a court for relief from the automatic stay prior to commencing or continuing proceedings against a debtor. United States v. Acme Solvents Reclaiming, Inc., 154 B.R. 72, 73 (Bankr. N.D. Ill. 1993); In re Pincombe, 256 B.R. 774, 782 (Bankr. N.D. Ill. 2000).

Fucilo received notice of the State's intent to pursue the State Action on September 11, 2000 upon service of the original defective motion. So long as the State was properly acting within the scope of the § 362(b)(4) (subject to the Public Purpose Test), the State had the authority to pursue the Debtor, and was free to commence the State Action. Therefore, even though the Debtor's discharge was entered prior to the preliminary hearing on the State's motion, neither the automatic stay of § 362 nor the permanent injunction of § 524 enjoined the State's Action.

safety, or similar police or regulatory laws, or attempting to fix damages for violation of such a law." H.R. Rep. No. 95-595, at 343 (1977).

Section 524 is analogous to § 362, in that it applies similar protection for a debtor against court proceedings. (Debtor's Supplemental Memorandum at para. 14 "Section 524 of the Code is the post-discharge analogue of Section 362 of the Code" (quoting Langlois v. United States, 155 B.R. 818 (Bankr. N.D.N.Y. 1993)). Indeed, though § 362 "stays" proceedings, § 524 "enjoins" such actions. These Code sections are comparable in many respects. *See* In re Wagner, 87 B.R. 612, 616 (Bankr. C.D. Cal. 1988) (explaining that section 524 is the post-discharge analogue of § 362).

Given the similarities of these two sections, the governmental exemption should apply with equal force both before and after the discharge. *See*, United States v. Marlow, 48 B.R. 261, 263 (D. Kan. 1984) (noting that § 524 "must be considered with the related section of Title 11, i.e. §§ 362, 506 and 522"). Thus, just as the automatic stay is inapplicable to a governmental unit prior to the discharge, the parallel intent of these statutes and the logic of the Code suggests that a governmental agency which would have been entitled to this relief under § 362 should be granted the post-discharge counterpart to this relief (an exemption from the § 524 injunction) under § 524.

Not only is this result reasonable and consistent with the congressional intent of the Code, it is also within this Court's power to grant under § 105 of the Code. In order to carry out

Congress's express goal that bankruptcy proceedings should not "frustrate necessary governmental function" (H.R. Rep. No. 95-595, at 343) and for the reasons set forth above, the State Action should proceed so long as the State is properly exercising its police and regulatory powers as understood in § 362(b)(4). The question is therefore, is the State Action of a type permitted by § 362(b)(4). As explained below, this Court finds that it is.

iii. The Scope and Purpose of § 362(b)(4)

Section 362 provides for exceptions to the automatic stay. One of the exceptions is the police and regulatory exception of § 362(b)(4). The police and regulatory exception as set forth in the statute expressly states that §§ 362(a)(1), (2),(3),(6) does not operate as a stay:

> **of the commencement or continuation of an action or proceeding by a governmental unit or any organization** exercising authority under the convention on the prohibition of the development, production, stockpiling and use of chemical weapons and on their destruction opened for signature on January 13, 1993, **to enforce such governmental unit's or organization's police and regulatory power, including the enforcement of a judgment other than a money judgment, obtained in an action or proceeding by the governmental unit to enforce such governmental unit's or organization's police or regulatory power.**

11 U.S.C. § 362(b)(4). (Emphasis added.)

The Code specifically exempts from the automatic stay certain actions by a governmental unit or organization if in pursuit of a police and regulatory power. 11 U.S.C. § 362(b)(4).

This is a specific exception to the automatic stay that was recently amended by Congress.[7] The legislative history of the 1990 amendment to section 362 sheds additional light on the police and regulatory exception from the automatic stay:

> Section 362(b)(4) indicates that the stay under section 362(a)(1) does not apply to affect the commencement or continuation of an action or proceeding by a governmental unit to enforce the governmental unit's police or regulatory power. This section is intended to be given a narrow construction in order to permit governmental units to pursue actions to protect the public health and safety and not to apply to actions by a governmental unit to protect a pecuniary interest in property of the debtor or property of the estate.

11 U.S.C.A. § 362 Historical and Statutory Notes, 1990 Acts, at pp. 62-63.

The legislative history of section 362 states:

> Where a governmental unit is suing a debtor to **prevent or stop violation of fraud** ... or similar police or regulatory laws, or attempting to fix damages for violation of such law, the action or proceedings is not stayed under the automatic stay.

S. Rep. No. 95-598, reprinted in 1978 U.S. Code Cong. and Admin. News at 5787, 5838.

(Emphasis added.)

As this legislative history demonstrates, § 362(b)(4) intends to exempt certain governmental actions from the automatic stay. Specifically, governmental action to protect the public from

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[7] The 1999 Chemical Weapons Implementation Act amended 11 U.S.C. § 362(b)(4) in three ways: former subsections (b)(4) and (b)(5) were combined; language was inserted into the introductory clause to provide expressly that the exception applies to actions otherwise falling under 11 U.S.C. § 362(a)(3) and (6); and organizations operating under the Chemical Weapons Convention were expressly identified as entitled to invoke 11 U.S.C. § 362(b)(4). The re-working created "apparently unintentional ambiguities, which are best resolved by reference to the pre-amendment version." 3 Collier on Bankruptcy, ¶ 362.05[5](b) (15th Ed. Rev. 2000).

fraudulent activities falls within the governmental exception provided by § 362(b)(4). In re Mark B. Herman, 160 B.R. 780 (Bankr. E.D. La. 1993).

iv. Application of § 362(b)(4)

This Court finds that the State Action is an attempt by New York to exercise its police and regulatory power. In reaching this conclusion, this Court applies § 362(b)(4). In doing so, this Court must examine: 1) whether the action is being brought by a governmental unit, and 2) whether the governmental unit is bringing the action to enforce its police and regulatory power. United States Dep't of Labor v. Fashion Headquarters, Inc., 1998 U.S. Dist. LEXIS 19042 (S.D.N.Y. Dec. 8, 1998) (citing City of New York v. Exxon Corp., 932 F.2d 1020, 1025 (2d Cir. 1991)).

The parties do not disagree that the New York State Attorney General is a governmental unit. Moving on to the second prong of the analysis, this Court must consider whether the State Action being brought against Fucilo pursuant to New York General Business Law Article 23-A and New York Executive Law § 63(12) qualifies under § 362(b)(4) as an exercise of police and regulatory power. In order to make this determination, courts in this circuit have utilized the "Pecuniary Purpose and Public Policy Tests" for ascertaining whether a state is exercising its police and regulatory power.

As Judge Garrity explained in In re Ngan Gung Restaurant, Inc., 183 B.R. 689, 691 (Bankr. S.D.N.Y. 1995):

> Courts apply the pecuniary purpose and public policy tests, to determine whether particular litigation falls within the police or regulatory power exception. *See, e.g.*, N.L.R.B. v. Continental Hagen Corp., 932 F.2d 828, 833-34 (9th Cir. 1991); Word Commerce Oil Co. (In re Commerce Oil Co.), 847 F.2d 291, 295 (6th Cir. 1988); In re Chateaugay Corp., 115 B.R. 28, 31 (Bankr. S.D.N.Y. 1988). The pecuniary purpose test focuses on whether the governmental action "relates primarily to the protection of the government's pecuniary interest in the debtor's property, and not to matters relating public safety." In re Commerce Oil Co., 847 F.2d at 295. "Those proceedings that relate primarily to matters of public safety are excepted from the stay." Id. Under the public policy test, a court must determine whether the proceedings seek to effectuate public policy, or merely are being brought to adjudicate private rights. Id. "Those proceedings that effectuate a public policy are excepted from the stay." Id.

Therefore if the Attorney General's State Action is for the purpose of "effectuat[ing] a public policy," then the State Action is an exercise of the police and regulatory power as set forth in § 362(b)(4).

v. Application of the "Pecuniary Purpose and Public Policy Tests"

This Court finds that the State Action is consistent with the police and regulatory exception of § 362(b)(4) because by bringing the State Action, the State is effectuating a public policy.

This Court finds that the remedies sought by the Attorney General are not designed to advance the government's pecuniary interest. Neither are the remedies designed to advance private rights. Rather the request to enjoin the defendant from further violations of the Martin Act and the request for restitution are a method of enforcing the policies that underlie the Martin Act. *See generally*, Ngan Gung, 183 B.R. at 695.

In bringing the State Action, the State is acting as a governmental unit pursuant to its police powers. Upon a reading of the Martin Act, New York Executive Law and the verified complaint, it is clear to this Court that the State is ultimately attempting to deter behavior, "[] such as defrauding investors[]...by making that behavior that much more expensive." S.E.C. v. Brennan, 230 F.3d 65, 73 (2d Cir. 2000). Therefore, under the Public Policy Test, the State Action is an attempt to act in a capacity consistent with § 362(b)(4).

vi. Section 362(b)(4) Does Not Bar an Action for Restitution

The Court will briefly respond to Debtor's argument urging that § 362(b)(4) prohibits the State from maintaining the State Action because the State seeks restitution.

Section 362(b)(4) permits a governmental unit or regulatory body to take an enforcement action so long as it is pursuant to a state's police and regulatory power. However, this police and regulatory power is not without limitations. When acting pursuant to § 362(b)(4) a state is prohibited from enforcing a money judgment that might arise out of the enforcement action. S.E.C. v. Brennan, 230 F.3d 65, 72 (2d Cir. 2000).

The State Action is seeking restitution and an injunction against Fucilo. However, when acting pursuant to § 362(b)(4) anything beyond the mere entry of a money judgment against a debtor is prohibited. (Debtor's Opposition to State's Motion at para. 9.) *See*, Brennan, 230 F.3d 65, 72. At oral argument, the Attorney General stated that the State Action is not near the entry of a money judgment. This is relevant because "even though governmental police

power actions may continue against the debtor, any money judgment [which] might [be] obtained in such action may not be enforced against the debtor without relief from the automatic stay ... because the enforcement of money judgments is excluded from the exception expressed in 11 U.S.C. 362(b)[(4)]." In re New York Trap Rock Corp., 153 B.R. 642, 645 (Bankr. S.D.N.Y. 1993); *see generally* Brennan, 230 F.3d 65. Enforcement of a judgment, however, is not before this Court at this time.

Moreover, the Court is not persuaded by the Debtor's argument that an action for restitution is *a fortiori* outside the scope of actions permitted by § 362(b)(4). Quite to the contrary, restitution actions are frequently brought by states pursuant to the police and regulatory power exception of § 362(b)(4).[8] This Court finds that the remedy of restitution in the State

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[8]*See generally*,S.E.C. v. Towers, 205 B.R. 32 (S.D.N.Y. 1997) (finding that injunctive relief and monetary damages in the context of securities fraud actions makes securities fraud unprofitable and is in furtherance of police and regulatory powers); In re Ngan Gung Restaurant, Inc., 183 B.R. 689 (Bankr. S.D.N.Y. 1995) (permitting state's action for restitution of unpaid employee wages and tips against debtor/employer as excepted from the stay, rejecting the debtor's contention that the restitution was akin to private collection efforts, concluding that the relief was a method of enforcing the policy underlying the labor laws); Berg v. Good Samaritan, 230 F.3d 1165 (9th Cir. 2000) (finding weight of authority and sound public policy support the conclusion that § 362(b)(4) applies to a court award of attorneys' fees as a sanction); In re Luskin's, Inc., 213 B.R. 107 (D. Md. 1997) (holding that the Maryland Attorney General's enforcement action under a consumer protection act was a legitimate use of its police and regulatory power even though it sought to reduce a monetary claim to a judgment); In re Gerald Nelson, 240 B.R. 802 (Bankr. Me. 1999) (permitting State of Maine to pursue a state court fraud action against debtor where the measure of damages was based on restitution to victims defrauded by debtors pre-petition conduct); In re Family Vending, 171 B.R. 907 (Bankr. N.D. Ga. 1994) (holding that a state proceeding which seeks restitution from a debtor in a consumer and investor protection context is excepted from the automatic stay even though the restitution sought is related to actual pecuniary losses of the consumers); United States v. Acme Solvents, 154 B.R. 72 (Bankr. N.D. Ill.1993) (explaining that "Congress intended actions for both injunctive and monetary relief to be exempt from the automatic stay"); Bilzerian v. S.E.C., 146 B.R. 871 (Bankr. M.D. Fla. 1992) (holding that the S.E.C.'s action against the debtor was excepted from the stay because purpose of restitution claim was to prevent those such as the debtor from repeatedly violating the securities laws); O'Brien v. Fischel, 74 B.R. 546 (D. Haw. 1987) (cases finding that although private parties may benefit financially from sanctions, the

Action is a permissible tool by which the State may exercise its police and regulatory powers under the exception provided by § 362(b)(4).

vii. Summary

This Court finds that the State Action is consistent with § 362(b)(4) because, *inter alia*, it meets the Public Purpose Test. Moreover, the State may proceed with the State Action because it is an exception to the automatic stay, and by extension, an exception to the permanent injunction.

VII. Conclusion

Upon the record of this case, and consistent with this decision, it is pursuant to §§ 105(a), 362(b)(4), and 524(a)(2), that this Court finds that the State may proceed in state court with its State Action against Debtor Frank Fucilo. The State's motion is granted.

ENTER:

Dated: January 24, 2002
Poughkeepsie, New York

/s/Cecelia G. Morris
CECELIA G. MORRIS
UNITED STATES BANKRUPTCY JUDGE

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deterrent effects of monetary penalties can be essential for the government to protect its regulatory interests).